QUESTION PRESENTED*

May a state, consistent with the Privileges and Immunities Clause, the Equal Protection Clause and the Commerce Clause, waive its bar examination requirement for experienced lawyers who live in that state, while denying that option to equally qualified lawyers solely because they live in another state?

*In addition to the parties identified on the cover, the American Corporate Counsel Association appeared as *amicus curiae* supporting Ms. Friedman in the court of appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-399

SUPREME COURT OF VIRGINIA
and DAVID B. BEACH, Clerk,
Supreme Court of Virginia,
Appellants,

v.

MYRNA E. FRIEDMAN,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The issue in this case is whether Virginia may constitutionally grant its residents an advantage that is not afforded to nonresidents in determining eligibility for admission to the Virginia bar. Under the court rule held unconstitutional by both lower courts here, experienced lawyers who live in Virginia and who meet certain other criteria may be admitted to the Virginia bar without taking a bar examination, whereas equally qualified lawyers who live outside Virginia must take the bar examination. Because none of the reasons advanced for this discriminatory treatment meets the applicable constitutional standards, the judgment below should be affirmed.

A. Bar Admissions in Virginia: An Overview

There are two methods by which a person may obtain a license to practice law in Virginia. The first method, which is available to both experienced practitioners and to individuals who do not hold a license to practice law, is to take and pass a two-day bar examination, which is administered in February and July of each year by the Virginia Board of Bar Examiners. Applicants wishing to take this examination must be over the age of eighteen years, be of good moral character, and have graduated from an accredited law school. Va. Code § 54-60.[1]

An alternative licensing scheme exists pursuant to Va. Code § 54-67, which empowers the Supreme Court of Virginia to adopt rules allowing lawyers who have been licensed for at least three years in another jurisdiction to be admitted to the Virginia bar without taking a bar examination, a process known as "motion admissions" or "admissions on motion." Motion admission rules have existed in Virginia for most of this century. *See* former Va. S. Ct. R. XX, 106 Va. xii (1907). The rule now in effect, Rule 1A:1, requires an applicant to have been licensed for at least five years by a jurisdiction which admits Virginia bar members without examination. An applicant must also show that he or she:

> (a) Is a proper person to practice law.
>
> (b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.
>
> (c) Has become a permanent resident of the Commonwealth.

[1]The statute previously contained a residence requirement which was held to violate the Privileges and Immunities Clause in *Giller v. Virginia Board of Bar Examiners*, Civ. No. 83-1282-A (E.D. Va. 8 February 1984), and was subsequently repealed.

> (d) Intends to practice full time as a member of the Virginia bar.

The residence requirement in subsection (c) is the focus of this case, but a brief history of Virginia's motion admission rules may shed some light on the justifications offered for the restriction today. When former Rule XX was adopted in 1907, it required motion applicants to have practiced law in another jurisdiction for at least three years and did not require them to live in Virginia. 106 Va. xii. Starting in 1938, motion applicants were required to live in Virginia for six months before filing their application, 172 Va. lxxii, and they were later required to state an intention to devote the "major portion" of their time to Virginia practice. 184 Va. lxxxi (1946). These two amendments were made to former Rule 23, which was later recodified as former Rule 1:5. 190 Va. lxxxiv (1949).

Motion applicants were not required to establish "permanent" residence in Virginia until 1961, at which time they were also obliged to declare an intention to practice law "full time" as members of the Virginia bar. 202 Va. xii. And in 1968, the Supreme Court of Virginia adopted former Rule 1:5.2, which provided that lawyers admitted on motion may lose their license if they move out of Virginia or cease full time practice there. 208 Va. cxxxvii. These rules were recodified in their current form in 1972 as Rules 1A:1 and 1A:3, respectively. 214 Va. 779 (1972).

Appellants' brief states (at 5-7, 22-23) that from 1907 on, Virginia's motion admission rules were intended to benefit only those experienced lawyers who had permanently relocated to Virginia. That assertion rests entirely on an affidavit from David B. Beach, the present Clerk of the Supreme Court of Virginia (J.A. 24-27), in which he discusses the aims of the current Rule, but does not purport to state what factors impelled the

Supreme Court of Virginia to undertake rulemaking in 1907, 1938, 1946, 1961 or 1968. Nor does he explain why the rule became progressively more restrictive or point to any contemporaneous explanatory statements on this subject. While we do not believe that the outcome of this case turns on the length of time that the current restrictions have been in place, it cannot be said, as appellants' brief argues,that Rule 1A:1 embodies an unswerving policy of 80 years' duration which this Court should be reluctant to overturn.[2]

B. Prior Proceedings

Appellee Myrna E. Friedman was admitted to the Illinois bar in 1977, to the District of Columbia bar in 1980, and to the Maryland bar in 1987 and is a member in good standing of all three (J.A. 30). From 1977 to 1981, she served as a lawyer with the Department of the Navy in Arlington, Virginia, and from 1982 until January 1986, she was a lawyer with Communications Satellite Corporation in Washington, D.C. (J.A. 30-31). In January 1986, she became Associate General Counsel of ERC International Inc. and began working at the company's headquarters in Fairfax County, Virginia. Ms. Friedman's duties include drafting contracts and advising her employer and its subsidiaries (which are Virginia corporations) on contract matters and securities laws, including matters of Virginia law. Her employer also wants her to represent the company and its subsidiaries in litigation, including cases in Virginia courts (J.A. 31).

[2]So far as we are aware, the Supreme Court of Virginia has construed Rule 1A:1's residence requirement only once. *Application of Titus*, 213 Va. 289, 191 S.E.2d 798 (1972). With respect to the Rule's full time practice requirement, that court has stated only that lawyers must maintain an in state office and a "regular" practice in Virginia. *Application of Brown*, 213 Va. 282, 286 n.3, 191 S.E.2d 812, 815 n.3 (1972).

When Ms. Friedman began work at ERC International, she lived in Virginia and thus satisfied the requirements of Rule 1A:1 (J.A. 30, 38-39). One month later, however, she married and moved to her husband's house in Cheverly, Maryland (J.A. 32, 38). In June 1986 she applied for membership in the Virginia bar under Rule 1A:1. In a letter filed with her application, she candidly acknowledged that she was no longer a resident of Virginia, but asked that her application be granted nonetheless. She stated that Virginia's "concerns should be satisfied since there will be no problem as far as a location for service of process is concerned, nor should it be difficult for me to be reached for court appearances should the need arise, since my office is in Virginia" (J.A. 35). She added that since she was working full time in Virginia, she would stay informed of developments in Virginia law, as it would be "in my best interest" to do so (J.A. 35). She later affirmed her willingness to undertake *pro bono* assignments, to attend continuing legal education courses "and to perform any other duties or responsibilities required of members of the Virginia bar" (J.A. 32).

Her application was nonetheless denied. By letter dated 17 June 1986, the Clerk of the Supreme Court of Virginia told Ms. Friedman that he had "been directed to advise you that the Court interprets your letter of June 5, 1986 to be a statement that you are not a permanent resident of the Commonwealth of Virginia. Thus, you are not eligible for admission to the Virginia bar by reciprocity," citing Rule 1A:1(c)(J.A. 51). He acknowledged this Court's decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), which invalidated an in-state residence requirement imposed on nonresidents who sought to be admitted to a state bar after taking a state's bar examination, but stated that the Supreme Court of Virginia had construed *Piper* as applying only to examination candidates and not to the "discretionary require-

ment in Rule 1A:1 of residence as a condition of admission by reciprocity" (J.A. 51-52).

On 25 September 1986 Ms. Friedman filed suit in the United States District Court for the Eastern District of Virginia. She sought declaratory and injunctive relief on the ground that Rule 1A:1(c), as well as the provision in Rule 1A:3 which threatens motion admittees with having their licenses revoked if they move out of Virginia, violated the Privileges and Immunities Clause, the Equal Protection Clause and the Commerce Clause of the United States Constitution (J.A. 2-6).

Both sides moved for summary judgment. After hearing argument on 14 November 1986, the district court (Bryan, C.J.) ruled that Rule 1A:1(c) violated the Privileges and Immunities Clause, but not the Equal Protection or Commerce Clauses (J.A. 11-14, J.S. App. A15). The court rejected the idea that one's proficiency in the law is enhanced by living in Virginia (J.A. 13). He also concluded that a lawyer's commitment to Virginia "can't be enhanced by residency unless you assume that the commitment she has made of agreeing to practice full time in Virginia is not going to be complied with; and I have no reason to think, and it hasn't been established on this record certainly, that nonresidents are any less likely to live up to their commitments than residents" (J.A. 13). The court termed the notion that nonresidents were less likely than residents to comply with the full time practice requirement "a provincialism we cannot indulge" (J.A. 13).

The Fourth Circuit unanimously affirmed on 12 June 1987 (J.S. App. A1-A14). The court (per Winter, C.J.) rejected appellants' threshold claim that the Privileges and Immunities Clause does not protect nonresident motion applicants because they had the option of taking the bar examination. As the court held, the pertinent inquiry is not whether nonresidents are completely barred from earning their livelihood in a state, but

whether they are treated on substantially the same terms as residents, inasmuch as the "Clause guarantees to the citizens of the nation that they may do business within a state on the same terms as the citizens of that state" (J.S. App. A6-A7). The court found this guarantee to be violated here, because the Rule discriminates on its face against residents of other states (J.S. App. A7-A8).

The court of appeals added that the Rule "certainly imposes a burden on the practice of law that justifies application of the scrutiny required by Article IV, § 2," inasmuch as examination applicants must pay a fee, spend time and money studying for the examination, wait several months for the results to be announced, and still face a risk of failure (J.S. App. A8-A9). The Rule thus operates "to deter attorneys who are leaving their previous practice to practice in this region, and who plan to live in Washington or Maryland, from competing with members of the Virginia bar," and it encourages lawyers to buy a home in Virginia, although they may prefer to live elsewhere (J.S. App. A9). Noting that this provision "is arguably designed as a means of economic protectionism with the attendant adverse effect of disrupting interstate harmony," the court held that Rule 1A:1(c) was subject to the Privileges and Immunities Clause (J.S. App. A9).

Turning to appellants' defenses of the Rule, the court found "no nexus between residence and lawyer competence and Virginia points to none" (J.S. App. A13). Nor was the court persuaded that living in Virginia promotes compliance with Rule's full time practice requirement. Noting that Virginia has established no mechanism to enforce this requirement, the court characterized the latter argument as little more than an assertion that Virginia residents are more likely to honor this commitment than nonresidents, and it found no basis for saying that a Virginia resident "will be more truthful than a

nonresident in stating his intention, or in carrying out his commitment, to practice full time in Virginia" (J.S. App. A13). The court added that there were less restrictive ways to achieve this goal, such as requiring all motion admittees to certify annually that they are complying with the full time practice rule (J.S. App. A14).

Finally, the court rejected the claim that the residence and full time practice requirements were "inter-dependent." The court concluded that, since the full time practice rule required motion applicants to have an office in Virginia, it was likely that any nonresidents would "live in places reasonably convenient to Virginia," and thus the residence requirement was "redundant" (J.S. App. A13-A14).

SUMMARY OF ARGUMENT

The judgment should be affirmed because the outcome of this case is controlled by *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) ("*Piper*"), which held that the Privileges and Immunities Clause bars a state from excluding nonresidents from its bar. Although *Piper* involved an applicant who had taken the state's bar examination, whereas this case involves an applicant seeking admission on motion, there is no valid basis for reaching a different result in the two cases. Rule 1A:1 offers qualified Virginia residents an inexpensive and speedy method for gaining a license to practice law, thus giving them an advantage over equally qualified applicants who happen to live in another state. That is precisely that sort of favoritism that is barred by the Clause, absent a substantial justification, and none exists here.

Appellants argue that the Clause does not apply because Virginia provides nonresidents the option of taking a bar examination. This Court has never held, however, that the protec-

tions of the Clause are available only when a state absolutely forecloses nonresidents from enjoying a privilege that is available to residents. Indeed, the Court has invalidated a number of state laws which did not totally exclude out-of-staters, but, as here, subjected them to burdens which were not imposed on state residents. And while Virginia may have no obligation to offer anyone the option of being admitted on motion, the state cannot condition the availability of that option in a way that impinges on constitutionally protected rights, in this case, the right to reside in the state of one's own choosing. The lower courts thus correctly examined Rule 1A:1(c) under the exacting standard used in Privileges and Immunities Clause cases.

The lower courts also correctly rejected the justifications advanced in defense of this Rule. Appellants make no claim that living in Virginia assures a lawyer's competence. Instead, they argue that the residence requirement assures one's commitment to Virginia and promotes compliance with Virginia's full time practice requirement for motion applicants. Neither justification is substantial enough to save the Rule.

Piper recognized that, as a practical matter, lawyers are unlikely to seek admission to a state's bar unless they contemplate a considerable practice in that state, and their anticipation and hope of earning a livelihood there is likely to assure that they act as competently and ethically on behalf of their clients as do residents. This point applies with equal force to motion applicants and applicants willing to take an examination. Motion applicants, no less than examination applicants, must commit themselves to paying the fee in order to gain their license, along with annual dues thereafter, and they must satisfy any requirements a state imposes, such as continuing legal education or mandatory *pro bono*, in addition to the re-

quirements imposed by other jurisdictions in which they are licensed.

Under the circumstances, there is no basis for concluding that a residence requirement assures a certain level of commitment which would otherwise be lacking, but even if there were, Virginia's full time practice rule provides a complete answer. If Virginia can insist that motion applicants must practice law full time in Virginia, there is surely no basis for impugning their commitment to Virginia, and the residence requirement is at best redundant, as the court of appeals recognized.

Nor does Virginia's residence requirement substantially assist compliance with the full time practice rule. Ms. Friedman has made the same commitment to full time practice that Virginia requires of its own residents, and thus the only way that this argument can be credited is if the Court assumes that Virginia residents are more truthful and more likely to honor their professional commitments than nonresidents. There is certainly no basis for reaching such a conclusion here. Moreover, Virginia has adopted no mechanism to enforce its full time practice requirement, but even if it did wish to assure compliance with that rule, there are less restrictive and far more effective ways of doing so than imposing a residence requirement, for example, by requiring an annual certification of compliance with the rule.

Rule 1A:1(c) is also invalid under the Equal Protection and Commerce Clauses. In recent Terms, this Court has struck down a number of state tax laws which discriminated against residents of other states, and in doing so, the Court employed a standard of review under the Equal Protection Clause that is more deferential to the state than that employed in Privileges and Immunities Clause cases. From a Commerce Clause perspective, the residence requirement is directly analagous

to state laws which favor entities having an in-state plant or office over entities which lack such a facility or which condition eligibility for a benefit on having such a facility, both of which have routinely been held invalid.

ARGUMENT

I. VIRGINIA'S RESIDENCE REQUIREMENT FOR MOTION APPLICANTS IS INVALID UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE.

A. Motion Admissions Are Subject to the Privileges and Immunities Clause.

1. Traditional Privileges and Immunities Clause Analysis Governs This Case.

Article IV, Section 2, Clause 1 of the United States Constitution, known as the Privileges and Immunities Clause, states:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

This Clause was intended by the Framers "to help fuse into one Nation a collection of independent, sovereign States" and to "insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)(footnote omitted).

The Court explained the importance of this Clause in *Austin v. New Hampshire*, 420 U.S. 656, 660-65 (1975): "During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread. The fourth of the Articles of

Confederation was intended to arrest this centrifugal tendency with some particularity." *Id.* at 660. While the "discriminations at which this Clause was aimed were by no means eradicated during the short life of the Confederation," the provision was "carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation." *Id.* at 660-61 (footnotes omitted). *See also Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869) ("no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this").

In assessing claims of discrimination under this Clause, a reviewing court must first determine whether the activity in question falls within its scope. This threshold inquiry is required because the protections of the Clause apply "[o]nly with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity." *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978). In *Baldwin*, the Clause was held not to apply to a law charging nonresidents a higher fee than residents for a license to hunt elk. The Court reasoned that since elk-hunting is "recreation" and not a "means of a livelihood," the right to a hunting license was not "fundamental" to promoting interstate harmony. *Id.* at 388.

The Court has made it clear, however, that the Clause does apply to state laws regulating "the pursuit of a common calling," and many of this Court's Privileges and Immunities Clause cases "have dealt with this basic and essential activity." *United Building & Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 219 (1984) ("*Camden*"). As stated in *Hicklin v. Orbeck*, 437 U.S. 518, 525 (1978), "a resident of one State is constitutionally entitled to travel to

another state for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other state." *See also Toomer v. Witsell, supra; Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871).

If this threshold test is met, the law in question must be subjected to exacting scrutiny. Thus, under *Toomer v. Witsell, supra*, discrimination against nonresidents is allowed only if they are "a peculiar source of the evil" at which the law is aimed, 334 U.S. at 398. As set forth in the Court's most recent statement of this test, the Clause allows discrimination against nonresidents only where "(1) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper, supra*, 470 U.S. at 284. The latter element includes examining the "availability of less restrictive means." *Id.*

In *Piper*, the Court struck down a state court rule which limited admission to the New Hampshire bar to state residents. After canvassing its earlier decisions, the Court stressed that "the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause," 470 U.S. at 280 n.9, and concluded that "the opportunity to practice law should be considered a 'fundamental right'" that falls within the ambit of the Clause. *Id.* at 281. "Like the occupations considered in our earlier cases, the practice of law is important to the national economy," and the legal profession also "has a noncommercial role and duty" — such as defending unpopular causes which local counsel may be unwilling to undertake — which makes the protections of the Clause particularly important. *Id.*

The Court then examined the rationales advanced by the state, namely, that nonresidents were less likely to: (1) remain familiar with local rules and practices; (2) behave ethically;

(3) be available for court proceedings; and (4) do *pro bono* and other volunteer work. The Court rejected each of these justifications. Specifically, it found no basis for assuming that "a nonresident lawyer — any more than a resident — would disserve his clients by failing to familiarize himself with the rules" or laws in effect in that state. *Id.* at 285. The Court also "found no reason to believe that a nonresident lawyer will conduct his practice in a dishonest manner," adding that one's "professional duty and interest in his reputation should provide the same incentive to maintain high ethical standards as they do for resident lawyers." *Id.* at 285-86.

Nor did the Court believe that the need to have lawyers available for hearings called on short notice warranted excluding nonresidents from the bar, noting that most lawyers seeking general admission to a state bar were likely to "reside in places reasonably convenient to New Hampshire." *Id.* at 287. The Court also found it reasonable to assume that most lawyers who are admitted to a state bar would perform their share of volunteer duties, adding that nonresidents and residents alike could be compelled to undertake mandatory *pro bono* assignments. *Id.* Finding no substantial reason for excluding nonresidents, the Court invalidated the rule.

The Court reached the same conclusion last Term in *Frazier v. Heebe*, 107 S. Ct. 2607 (1987), which struck down a federal district court rule requiring members of that court's bar to live or have an office in the state where the court sat. Although the case was decided in an exercise of the Court's supervisory authority, the Court employed the Privileges and Immunities Clause analysis of *Piper* in deciding that neither the residence nor the office requirement advanced the asserted goals of lawyer competence and availability for hearings. *Id.* at 2612-14.

In our view, the rationale employed in *Piper* controls the outcome of this case. Just as the rule in *Piper* gave an advantage to New Hampshire residents, Rule 1A:1 offers Virginia citizens an inexpensive and speedy method for obtaining a license to practice law in Virginia, while denying that option to equally qualified nonresidents. It is precisely this sort of favoritism that the Clause prohibits and which this Court held invalid in *Piper*, absent a substantial justification, which is no more present here than it was in *Piper*.

There is no reason to think that if Ms. Friedman had stayed in Virginia, rather than moving to Maryland, she would have read the Virginia advance sheets more diligently, behaved more ethically, or volunteered more readily for *pro bono* assignments. Indeed, because she is working for and advising a Virginia company, her job will require her to render opinions on Virginia law and to represent her employer and its subsidiaries in Virginia courts. Those factors will provide more than enough incentive for her to keep up with changes in the law. She has also stated her willingness to undertake *pro bono* assignments or any other obligations that are required of members of the Virginia bar (J.A. 31-32). In short, there is simply no basis for challenging her competence, her commitment to Virginia, or her willingness to comply with Virginia's full time practice requirement because of the fact that when she leaves the office each night, she goes to a home in Maryland, rather than one in Virginia.

The same can be said not only of Ms. Friedman, but of other motion applicants who happen to live outside Virginia. *Piper* and *Frazier* rejected in very broad terms the notion that a lawyer's residence is a valid measure of his or her legal skills, ethics or dedication to the state where he or she proposes to earn a livelihood. If, for example, a Maryland lawyer has practiced law proficiently for several years and then seeks admission to the Virginia bar on motion, there is no reason to believe that his or her proficiency turns on whether the lawyer

lives in Maryland or Virginia. But even if one accepts appellants' basic proposition that, as a class, nonresident motion applicants pose special problems to the administration of justice in Virginia, that concern is addressed by the full time practice requirement in Rule 1A:1(d). Surely, if Virginia can insist that motion admittees must practice full time as a Virginia lawyer or face expulsion from the bar under Rule 1A:3, the site of that lawyer's home is irrelevant to any legitimate interest that Virginia has.

2. Appellants' Contentions that the Clause Does Not Apply Here Are Without Merit.

Appellants' principal response (at 13-21) is that neither *Piper* nor any of this Court's other Privileges and Immunities Clause cases applies here because the Clause protects only those applicants who are willing to take a bar examination. In their view, the opportunity to be admitted to a state bar on motion is not a "right" that is "fundamental" to promoting interstate harmony, and therefore a state may limit motion admissions to its own citizens without violating the Privileges and Immunities Clause. Relying on *Baldwin v. Montana Fish & Game Comm'n*, *supra*, 436 U.S. at 383, 388, and *Camden*, *supra*, 465 U.S. at [illegible] they take the position that admission on motion is a "special dispensation," and "[s]o long as any applicant may gain admission to a State's bar, without regard to residence, by passing the bar examination, the principles underlying the privileges and immunities clause are satisfied." Brief for Appellants at 14, 21. This argument is flawed for a number of reasons.

First, if the Court should hold that Rule 1A:1(c) is subject to scrutiny under the Privileges and Immunities Clause, that does not mean, as appellants' first Question Presented and

first Argument suggest, that out-of-state residents will automatically be admitted to the Virginia bar. All that it means is that appellants must show that there is a substantial reason for excluding nonresidents from the motion admissions process, and even if the residence requirement is struck down, individual applicants must still satisfy any legitimate conditions imposed by the state.

Second, *Piper* cannot be read as narrowly as appellants wish. The case unequivocally states that "the opportunity to practice law should be considered a "fundamental right"' which is protected by the Clause, 470 U.S. at 281, and *see* p. 13, *supra*. What appellants are really saying is that so long as a state offers nonresidents some means of obtaining a license to pursue their chosen profession, the state is free to discriminate against these applicants and to favor its own residents without limitation. That is not the law.

This Court has never held that the protections of the Clause are triggered only when a nonresident is completely excluded from pursuing his or her profession in a state. Indeed, some of the Court's leading cases on this subject have struck down state laws which did not exclude nonresidents, but simply charged them higher licensing fees. Illustrative are cases in which nonresidents were charged more money to obtain a commercial fishing license than state residents had to pay, *e.g.*, *Toomer v. Witsell*, *supra*; *Mullaney v. Anderson*, 342 U.S. 415 (1952), or in which a nonresident had to obtain a permit to do business in a state, while residents were excused from that obligation. *Ward v. Maryland*, *supra*.

The Privileges and Immunities Clause is considerably broader in scope than appellants concede. As this Court has observed, the Clause was intended to cure "the practice of some States denying to outlanders treatment that its citizens de-

manded for themselves." *Austin v. New Hampshire, supra,* 420 U.S. at 660. Indeed, "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer v. Witsell, supra,* 334 U.S. at 396. Here, Virginia residents have "demanded for themselves" the option of being licensed without examination, and Ms. Friedman is not able to do business "on terms of substantial equality" with Virginia residents who are similarly situated. For lawyers in her position, this discriminatory treatment has important practical consequences.

Thus, if Ms. Friedman had remained a Virginia resident, all she would have to do to gain admission to the Virginia bar is fill out the requisite application forms, pay a fee of $225 (J.A. 52), and then wait several months for the application to be approved.[3] Because Ms. Friedman lives in Maryland, however, the process is more time-consuming and expensive in several respects.

First, the Virginia bar examination is administered only twice a year, whereas motion applicants can file their papers at any time. Second, Ms. Friedman would have to pay a $325 fee to take the bar examination, whereas a motion applicant would pay only $225. Third, she, along with almost every other examination applicant, would enroll in a bar review course. These review courses are not only costly, but also require an extensive commitment of time, which is a particular burden for an experienced lawyer trying to maintain a full time practice or

[3]The National Conference of Bar Examiners, which conducts character interviews for state licensing bodies, advises that its investigations of Virginia applicants are currently completed in 90 days, and we understand that motion applicants can be admitted to the Virginia bar in less than four months after filing an application.

job.[4] Finally, after several months have been consumed in preparing for the examination, she must wait several additional months for the papers to be graded, the results to be announced, and the successful applicants to be sworn in. And of course, passing the examination is not a certainty, even for experienced lawyers.

The ability to gain admission to the bar on motion thus gives Virginia residents a decided advantage over equally qualified nonresidents, and the court of appeals correctly concluded that depriving nonresidents of this option "certainly imposes a burden on the practice of law" which is sufficient to trigger scrutiny under the Privileges and Immunities Clause (J.S. App. A8). As that court observed, the Rule's preference for Virginia residents over nonresidents may prevent lawyers who want to practice in Virginia, but who want to live in Maryland or Washington, from competing with members of the Virginia bar *(id.)*. In addition, a nonresident deciding whether to take a legal job in Virginia is forced to choose between moving to Virginia or making an extensive commitment of time and money in order to take the Virginia bar examination. By steering lawyers towards buying a home in Virginia, the Rule operates in a protectionist manner "with the attendant adverse effect of disrupting interstate harmony" (J.S. App. A9)(footnote omitted).

The residence requirement can unfairly prejudice nonresidents in another way. From the standpoint of a Virginia law firm or employer, the motion admissions option may make a job applicant who lives in Virginia a more attractive candidate than an equally qualified nonresident. The Virginia resident

[4]For example, if Ms. Friedman loses this case, she will likely take a six-week review course which meets four nights a week for 3-1/4 hours nightly, plus another 7-½ hours each Saturday, at a cost of $845.

can be licensed more quickly, can assume responsibility for litigation and other matters more quickly, and will not be distracted by having to prepare for and take a bar examination. In addition, unless the character investigation unearths a serious problem, it is a certainty that the application will be granted, whereas examination candidates always face the risk of failure.

Appellants make much of the fact that the motion admissions process is discretionary in nature, noting repeatedly that a number of states require all applicants to take an examination and waive that requirement for no one. Brief for Appellants at 8-10, 19-21. Their point seems to be that since Virginia could abolish Rule 1A:1 and make all applicants take the bar examination, it has considerable (if not total) discretion to decide when and for whom that condition should be waived.

The fact that a particular benefit is granted as a matter of discretion has not been a factor in this Court's Privileges and Immunities Clause cases. Indeed, decisions such as *Toomer* and *Mullaney*, where nonresidents were charged higher fees for commercial fishing licenses than were charged state residents, demonstrate that the Clause is routinely applied to laws which give state residents preferential access to certain resources or benefits, even though the state is under no obligation to make such access available to anyone.

Appellants' argument has also been rejected by this Court in cases involving unconstitutional conditions, of which Rule 1A:1(c) is a classic example, since it requires applicants such as Ms. Friedman to give up their constitutional right to live in the state of their choosing if they wish to take advantage of the preferred method for gaining a license to practice law in Virginia. The general rule was stated in a leading early case as follows:

> [T]he state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.

Frost v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926). Thus, in *Speiser v. Randall*, 357 U.S. 513 (1957), this Court struck down a state law which granted property tax exemptions to only those veterans who were willing to sign a loyalty oath. Of *Speiser* the Court later explained:

> While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of [constitutionally protected rights] and thereby threatened to "produce a result which the State could not command directly."

Sherbert v. Verner, 374 U.S. 398, 405 (1963), quoting *Speiser, supra*, 357, U.S. at 256. This principle has been followed in a number of settings involving various constitutional rights. *E.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)(due process right to a hearing); *Evitts v. Lucey*, 469 U.S. 387 (1985)(effective assistance of counsel); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)(freedom of speech); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967)(right of self-incrimination); *Sherbert v. Verner, supra* (freedom of religion). *See generally* Westen, *The Rueful Rhetoric of "Rights,"* 33 U.C.L.A.L. Rev. 977 (1986).

Similarly, the fact that a state offers persons adversely affected by a discriminatory policy an alternate way of achieving their goal does not immunize that policy from scrutiny under

the applicable constitutional standard. For example, in *Piper*, nonresidents were allowed to practice law in New Hampshire on a *pro hac vice* basis, but that option did not save the rule or erase the fact that nonresidents were unfairly prejudiced by their exclusion from the state bar. 470 U.S. at 277 n.2. *Cf. Frazier v. Heebe, supra*, 107 S. Ct. at 2614.

The Court has taken a similar approach with respect to the existence of potential alternatives in an equal protection context. In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the Court struck down a statute barring a male applicant from attending an all-female nursing school. Although the applicant could have attended another state nursing school, the Court found that this option was insufficient to sustain the gender-based discrimination, inasmuch as the statute placed burdens on him that did not apply to women similarly situated. *Id.* at 723-24 n.8. *See also Harman v. Forssenius*, 380 U.S. 528, 540-42 (1965) (striking down poll tax even though statute gave voters an alternative means of voting without having to pay the tax).

Under appellants' argument, the fact that a state could abolish motion admissions entirely would permit it to limit admission on motion to members of a particular gender, ethnic group, religion, or political party, so long as it did not impose any such limitation on individuals who were willing to take the bar examination. Just as there is no basis for holding that a state is free to discriminate against motion applicants based on race, gender or similar factors, there is no basis for saying that a state can discriminate against applicants who live in another jurisdiction, simply because the state has the option of abolishing motion admissions entirely.

Nor, contrary to appellants' assertion (at 18), does *Frazier v. Heebe, supra*, support their claim that the protections of the Privileges and Immunities Clause are triggered only with

respect to nonresidents who are willing to take the bar examination. Appellants seize upon the Court's observation in *Frazier* that the nonresidents being excluded there had "passed the Louisiana bar examination," and they erroneously suggest that this fact was crucial to the outcome. 107 S. Ct. at 2612. The rule at issue in *Frazier* required members of the district court bar to be members of the Louisiana state bar, and it is true that Louisiana had no motion admission process. But there is nothing in this Court's opinion which suggests that the validity of the residence requirement in *Frazier* in any way turned on the means by which lawyers could gain admission to the Louisiana state bar.

The point being made in *Frazier* was that nonresidents had shown their competence to the same extent as Louisiana residents, which in that case required taking an examination. Here, Virginia has made a determination that lawyers licensed elsewhere for at least five years do not need to prove their competence by taking an examination. Having made that determination, Virginia may not assume that the only experienced attorneys entitled to this presumption of competence are those who agree to live in Virginia, unless the assumption can withstand the exacting scrutiny required by the Privileges and Immunities Clause.

Nor can appellants find any comfort in *Leis v. Flynt*, 439 U.S. 438 (1979), which they cite (at 20) for the proposition that a reviewing court should give substantial deference to conditions imposed on applicants to a state's bar who have alternative means of obtaining a license. But *Leis* merely upheld a state court ruling that nonresident lawyers who were not members of the state bar could be denied leave to appear *pro hac vice* in a particular case. After *Piper*, it is clear that *Leis* has no bearing whatsoever when a nonresident seeks general admission to a state bar and possesses the "same professional

and personal qualifications required of resident lawyers." *Piper, supra,* 470 U.S. at 284 n.16. Since Ms. Friedman is willing to do whatever Virginia requires of its own residents who qualify for admission on motion, *Leis* is irrelevant to this case.

Appellants' argument that the Privileges and Immunities Clause has no bearing here relies heavily on *Sestric v. Clark,* 765 F.2d 655 (7th Cir. 1985), *cert. denied,* 474 U.S. 1086 (1986), which was followed in *Sommermeyer v. Supreme Court of Wyoming,* 659 F. Supp. 207 (D. Wyo. 1987), *appeal pending,* No. 87-1811 (10th Cir.) (awaiting argument). *Sestric* added in *dictum* that even if the Clause did apply, a residence requirement for motion applicants was valid, a point we answer at pp. 27-31, *infra*. At this time, we limit our discussion of *Sestric* to explaining why its holding that the Clause does not protect motion applicants is in error or at least inapplicable to this case.

Sestric upheld an Illinois rule requiring motion applicants to live in Illinois, reasoning that the rule benefitted only "new" Illinois residents and that it disadvantaged "old" Illinois residents and nonresidents alike; therefore, the court held, the rule did not involve discrimination based on state citizenship. 765 F.2d at 657-58. The flaw in that reasoning is that this Court has never held that the Privileges and Immunities Clause applies only when a state manages to craft a law which benefits only state residents and injures only nonresidents. Indeed, in *Camden,* this Court held that the Clause applied to a city ordinance which reserved public works jobs to city residents and denied them to both residents of other states, as well as to residents of every other community in the state: a state law is "not immune from court review at the behest of out-of-state residents merely become some in-state residents are similarly disadvantaged." 465 U.S. at 218. Thus, under *Camden,* the pertinent inquiry is whether state residents are the only people who can take advantage of a particular benefit, even if there are some state residents who fail to qualify. That is precisely this case.[5]

Appellants also cite *Sestric* for another proposition which warrants a brief response. *Sestric* expressed concern that striking down a residency requirement for motion applicants might impel some states to abolish the motion admission option and make all applicants take a bar examination. 765 F.2d at 665. Appellants echo that concern, noting that the number of states admitting lawyers on motion has declined over the past 20 years, although they give no reasons for those changes. Brief for Appellants at 8-9, 46-48. Yet the possibility that Virginia or some other state might take such action if the judgment here is affirmed has no bearing on whether this Rule is constitutional.

In cases alleging unconstitutional discrimination, a court decision invalidating the law in question gives a state two options: make the benefit available to everyone or to no one. We are aware of no case in which this Court has held that a reviewing court should try to predict what the state might do if the law

[5]Even if *Sestric* had correctly stated the law, the only way that the case would apply here is if there were some Virginia residents who could not be admitted on motion even if they met all the other requirements of Rule 1A:1. No such category exists. It is entirely possible for a lawyer to live in Virginia, to be licensed solely in a neighboring jurisdiction and to commute to work there while living in Virginia. If such an "old" Virginia resident sought admission to the Virginia bar on motion, he or she would stand on an equal footing with a "new" Virginia resident. Thus, in *Goldfarb v. Supreme Court of Virginia,* 766 F.2d 859 (4th Cir. 1985), *cert. denied,* 474 U.S. 1086 (1986), a 22-year resident of Virginia who practiced in the District of Columbia was denied admission to the Virginia bar under Rule 1A:1 because he was unwilling to satisfy the full time practice requirement and not because he had lived in Virginia for too long, or too short, a period of time.

is struck down, or that a constitutional ruling should depend, even in part, on a court's judgment that the benefit in question reflects sound public policy and should be retained, even if some people are excluded. Accordingly, any such speculation has no bearing on this case. *See also* pp. 43-44, *infra*.

* * *

In sum, Virginia's efforts to avoid scrutiny under the Privileges and Immunities Clause are to no avail. Ms. Friedman has done everything that Virginia requires of its own residents who seek admission to the bar on motion, but she was denied this opportunity solely because she lives in Maryland. Such discrimination is specifically forbidden under the Privileges and Immunities Clause absent a "substantial reason," and, as we now demonstrate, none exists here.

B. The Residence Requirement in This Rule Does Not Bear Substantial Relationship to the Goals Imputed to It.

Appellants concede (at 22) that if the Privileges and Immunities Clause applies to this case, there must be a "substantial reason" for the different treatment of nonresidents and a showing that the discrimination in question "bears a substantial relationship to the State's objectives," including an examination of whether "less restrictive means" are available to achieve that goal and whether nonresidents are a "peculiar source of the evil at which the statute is aimed." *See Piper, supra*, 470 U.S. at 284; *Camden, supra*, 465 U.S. at 222.

In defending Rule 1A:1(c), appellants do not claim that living in Virginia assures one's proficiency in the law, nor can they after *Piper*. Instead, they argue (at 26) that the Rule promotes two goals: first, "to provide a concrete demonstration of the untested applicant's commitment in fact to service to

the bar of Virginia and to Virginia clients," and second, "to facilitate compliance with, and the enforcement of, the full time practice requirement." In their view, the "evil" posed by nonresident motion applicants is that they "have made no commitment whatsoever to the administration of justice in the State, and are entitled to no presumption that they will willingly and actively participate in bar activities and obligations, or fulfill their public service responsibilities to the State's client community," particularly when they retain membership in another bar. Brief for Appellants at 26-27. As we now explain, Rule 1A:1(c) in no way helps achieve the goals attributed to it, nor are appellants justified in their wide-ranging indictment of multijurisdictional licensing or practice.

1. There Is No Basis for Questioning the Commitment of Motion Applicants to Virginia.

The flaw in appellants' "commitment" argument, as well as in decisions such as *Sestric* and *Sommermeyer*, is the assumption that if an experienced lawyer seeks admission on motion, he or she is making "*no* personal investment in the jurisdiction" and must therefore be encumbered with some requirement which assures the requisite level of commitment. Brief for Appellants at 26 (emphasis added). There are two answers to this point.

First, the Court recognized in *Piper* that it is "unlikely," as a "practical matter," that a nonresident will seek admission to a state bar unless the lawyer has or anticipates "a considerable practice" in that state. 470 U.S. at 285. The Court reasoned that lawyers would naturally be concerned about providing quality service to clients and staying abreast of changes in local law, regardless of where they live; further, their interest in earning a livelihood in a community provides sufficient incentive to assure high ethical standards, even if they live elsewhere. *Id.* at 285-86.

That logic applies as well to motion applicants. Being licensed on motion may be less strenuous and costly than preparing for and taking a bar examination, but it requires personal investment and commitment nonetheless. Being admitted to the Virginia bar on motion also requires an initial outlay of $225 and an annual expenditure thereafter of $150 in dues to the Virginia State Bar, in addition to whatever dues a lawyer may be paying in another state. Lawyers admitted on motion, no less than lawyers admitted by examination, must also satisfy Virginia's continuing legal education requirements as well as those in effect in any other states where they practice. *See* Rules of the Supreme Court of Virginia, Pt. 6, § 4, ¶ 17. Thus, holding a license in more than one state, even one obtained through the motion admission process, requires an ongoing commitment of time and money. It is unlikely that a lawyer will make that commitment simply to hang another sheepskin on the office wall, regardless of where he or she lives.[6]

Second, even if a state may require motion applicants to satisfy some condition that is intended to demonstrate their commitment to serving the public, a residence requirement is not a valid measure, as this case illustrates. Ms. Friedman lived in Virginia for over eight years before she married and moved to Maryland (J.A. 38-39). She is the same person now

[6]Appellants note that when Ms. Friedman sought admission to the Virginia bar, she also sought admission to the Maryland bar, a fact which she disclosed when she filed her Virginia application and which was not seen as disqualifying her then (J.A. 36, 51-52). As Ms. Friedman explained in an affidavit, she applied to both bars simultaneously in order to reduce her cost and administrative burden and also to be available to represent her Virginia employer in litigation in Maryland (J.A. 58-60). Appellants cite this point to suggest that membership in several bars somehow threatens one's ability to satisfy Virginia's full time practice requirement, but motion admittees who live in Virginia are permitted to retain their memberships in other states' bars, and there is no basis for believing that Virginia residents are any less subject to alleged conflicts of loyalty than nonresidents. Brief for Appellants at 28 & n.10.

she was then, and there is no reason to believe that her willingness to honor professional commitments or her good faith plunged dramatically after she moved to Maryland. Indeed, she was admitted to the District of Columbia bar on motion and worked there for several years while living in Virginia, and there is nothing to suggest that her professional commitment to the District of Columbia was compromised because she went home to Virginia each night.

It would be one thing if the condition which Virginia sought to impose in order to assure an applicant's commitment had something to do with the practice of law, *e.g.*, making motion applicants take a special continuing legal education course, or giving them a temporary one-year license and reviewing their performance before the license is made permanent, or even requiring a three-hour practitioner's examination on local rules of practice, as Massachusetts and Maryland now do. As this Court recognized in *Piper*, however, the site on one's residence has nothing to do with one's commitment or competence. 470 U.S. at 285-87.

Appellants' brief also makes much of the fact that Virginia bar members are "expected" (but not required) to participate in various activities of the Virginia State Bar, as well as local bar associations, and they note that Virginia has established voluntary programs which provide *pro bono* services. Brief for Appellants at 31-32. Once again, *Piper* provides a complete answer. The Court there found it "reasonable to believe . . . that most lawyers who become members of a state bar will endeavor to perform their share of these services," but that a nonresident bar member, no less than resident members, "could be required to represent indigents and perhaps to participate in formal legal-aid work." 470 U.S. at 287 (footnote omitted).

Moreover, appellants' brief does not discuss the extent to

which Virginia bar members *in fact* participate in these activities, nor do appellants offer any evidence to show that living in Virginia somehow imbues a lawyer with a "spirit of public service" that is absent if one lives in Maryland or some other state. *See* Brief for Appellants at 29. Indeed, if Virginia were to open the motion admissions process to more lawyers, it would expand the pool of lawyers available to take part in bar activities, to the benefit of the bar associations and the citizens of Virginia alike. And if not enough lawyers were volunteering for such activities, Virginia could make participation mandatory for all members of its bar.[7]

In short, there is no substantial reason for discriminating against nonresidents based on amorphous concepts about their lack of "commitment," and appellants certainly have not shown that limiting motion admissions to Virginia residents "bears a substantial relationship" towards achieving that goal. *Piper, supra*, 470 U.S. at 284. But even beyond these arguments, there is a unique factor which is present here which is not present in cases such as *Sestric* and *Sommermeyer*: Virginia's fulltime practice rule, which provides a complete answer to appellants' "commitment" argument, as the court of appeals correctly concluded (J.S. App. A11).

Thus, Rule 1A:1 requires motion applicants to commit themselves not simply to a "considerable practice" in Virginia, *see*

[7]Indeed, if the act of living in Virginia promotes a lawyer's willingness to volunteer his or her services, then it would be logical for the Supreme Court of Virginia to abolish its full time practice requirement for motion applicants, which erects barriers to experienced lawyers who live in Virginia, but who practice in the District of Columbia or Maryland. At least some of those lawyers would be willing to represent individuals *pro bono* in their home community if they could be admitted to the Virginia bar on motion. However, they cannot justify taking the time away from their practice to study for and take a bar examination, nor are they willing to abandon their established practice and become full time Virginia practitioners, which is the only means by which they can avoid the examination requirement. *See Goldfarb v. Supreme Court of Virginia, supra*.

Piper, supra, 470 U.S. at 285, but to *full time* practice in Virginia. No other state which licenses lawyers on motion insists on such a requirement. Surely, if Virginia can impose such an onerous restriction and require motion applicants to foreswear practicing law in any other state, appellants have no reason to doubt the "personal investment" or "commitment" these lawyers are making to Virginia. Accordingly, if the Court is not persuaded to apply the reasoning of *Piper* to motion applicants generally, the full time practice rule provides a ready answer to appellants' claims in this case, either by itself or in conjunction with the arguments made above.

2. A Residence Requirement Is Not Substantially Related to Assuring Compliance with the Full Time Practice Rule.

Appellants also argue that the residence requirement enhances compliance with the full time practice rule. According to Mr. Beach: "Apart from the Court's reliance on the good faith of an applicant's assertion" that he or she will comply with Rule 1A:1(d), or the receipt of a third party complaint that the Rule is being violated, "there is no other readily available or administratively feasible mechanism for monitoring or enforcing" the full time practice requirement (J.A. 26). He adds that requiring lawyers to live in Virginia "ensures that the demands of an out of state practice or residence in a distant location will not stand in the way of the applicant's becoming a proficient Virginia practitioner" (J.A. 27). Assuming that the full time practice rule is itself a valid condition to be imposed on motion applicants, this argument does not pass muster under *Piper*.[8]

[8]In *Goldfarb v. Supreme Court of Virginia, supra*, the Fourth Circuit upheld Virginia's full time practice rule against a challenge based on the Commerce and Due Process Clauses, and this Court denied *certiorari* with two Justices voting to grant review. In Part III of this Argument, we ex-

Appellants' brief asserts (at 34) that the full time practice rule requires motion applicants merely to "promise" at the time of their admission that they will practice full time in Virginia and that it requires no more than an applicant's "good faith" assertions of future compliance. But since Ms. Friedman made the same "promise" that Virginia demands of its own citizens, appellants' argument is little more than an assertion that Virginia does not trust the "good faith" of lawyers who live in other states. That is precisely the sort of parochialism that the Privileges and Immunities Clause is intended to root out. The court of appeals properly rejected the notion that Virginia residents are more honorable than residents of other states or that a Virginia resident "will be more truthful than a nonresident in stating his intention, or in carrying out his commitment, to practice full-time in Virginia" (J.S. App. A13).

Most lawyers take their professional commitments seriously and would not seek admission on motion unless they contemplated complying with Virginia's full time practice rule. Appellants contend, however (at 38), that the residence requirement is a "mutually reinforcing" companion to the full time practice rule. As part of this argument, they point out that they have adopted no formal method of enforcing the full time practice rule, and thus they use residence in Virginia as a convenient surrogate. But far from saving the residence rule, this argument only serves to underscore the imprecise way in

plain why Virginia's residence requirement violates the Commerce Clause; should the Court adopt this argument, a likely effect would be to nullify the full time practice rule upheld in *Goldfarb*. Even if the Court should conclude that Virginia's residence requirement is invalid under the Privileges and Immunities Clause, it would be difficult to square *Goldfarb* with such a holding, particularly in light of this Court's observations about the "mutually reinforcing relationship" between the Privileges and Immunities and Commerce Clauses. *Hicklin v. Orbeck*, *supra*, 437 U.S. at 531.

which the residence requirement works to achieve its asserted goals.

The residence requirement is plainly overinclusive in that it applies to individuals such as Ms. Friedman, who are working full time in Virginia and who do not (and in some instances cannot) engage in a law practice outside Virginia. The requirement is also underinclusive since it simply assumes that anyone who lives in Virginia will continue to practice there on a full-time basis, despite the opportunities for full or part time practice in neighboring jurisdictions.[9]

Moreover, as the court of appeals noted, there are less restrictive and more effective ways to promote compliance with the full time practice rule short of penalizing all out-of-state residents, for example, by requiring all motion admittees to certify annually that they are still in compliance with Rule 1A:1 (J.S. App. A13). In reply, appellants protest (at 38) that such a requirement would provide no assurance that lawyers would respond truthfully to such an inquiry and might use sham offices in order to evade the rule. Of course, as the court of appeals pointed out, lawyers who want to evade the residence requirement may establish a sham residence in Virginia as easily as they may evade the full time practice rule by establishing a sham office in Virginia (J.S. App. A14). Thus, the only basis for believing that the latter kind of fraud is more likely to occur than the former is if one assumes that Virginia residents are more truthful than nonresidents, an assumption which the

[9]Indeed, it is doubtful that the residence requirement plays any role in assuring compliance with the full time practice rule, or *vice versa*, for the record indicates that *neither* rule is being enforced. Appellants filed with their stay papers a November 1986 newspaper story in which the Virginia Bar Counsel stated that during his nine years in office, he had never seen a disciplinary case involving Rule 1A:1(c) and only one case involving Rule 1A:1(d), which involved other disciplinary matters as well (J.A. 20-21).

district court dismissed as a "provincialism we cannot indulge" (J.A. 13).

Under the circumstances, the Court should not credit appellants' claims that the residence requirement somehow "insulates" motion admittees from practicing law in other states or prevents "chicanery." Brief for Appellants at 36, 41. But even if motion admittees did engage in a multi-jurisdictional practice, experience suggests that this sort of practice is not an evil which a state must prevent at all costs. The full time practice requirement is unique to Virginia; the 22 other jurisdictions which admit lawyers on motion are content to let motion admittees practice in more than one state, as are the eight states which administer only a shorter attorneys' examination. Brief for Appellants at 9 & nn. 3, 5.

Moreover, there has been a trend towards greater uniformity of substantive and procedural law in recent years. Hafter, *Towards the Multistate Practice of Law Through Admission by Reciprocity*, 53 Miss. L.J. 1, 9 (1983). Also, the degree to which lawyer proficiency is tested by a bar examination has become more standardized. At present, 46 states, three territories and the District of Columbia administer the Multistate Bar Examination, a multiple-choice examination covering several subjects, as part of their own bar examination. *Multistate Bar Examination Statistics*, 56 Bar Examiner, No. 2, at 18-19 (1987).

Additionally, the practice of law has become increasingly specialized. Many lawyers, particularly those who have practiced for the minimum five year period required of motion applicants in Virginia, have at least begun to develop a certain expertise in some area of the law. If they are called upon to use that expertise on behalf of clients in more than one state, they can likely do so quite competently without the need to prove themselves by taking additional full-length bar examinations or submitting to restrictions of the sort set out in Rule 1A:1. The point was eloquently made by Chesterfield Smith, a former president of the American Bar Association:

> Admission to the bar in another state through a general bar examination becomes increasingly difficult for the proficient, older lawyer who wants only a limited practice in an additional state, or who because of client demand wants to practice in multiple states, or who wants to migrate to a state where the demand for practitioners in a particular branch of the law is large, or who wants to associate with a law firm with lawyers from other states and offer firm-wide, multioffice service to clients in several states, or who simply made a geographical mistake in selecting a state in which to practice. The better a lawyer is in one branch of the law, the more specialized in a particular area of the law practice, the greater the lawyer's difficulty in gaining admission through a general bar examination.

Smith, *Time for a National Practice of Law Act*, 64 A.B.A.J. 557, 558 (1978). *See also* Hafter, *supra*, 53 Miss. L.J. 1 (urging uniform standard for state bar admissions by reciprocity).

The courts below were thus correct in holding that Rule 1A:1(c) is invalid under the Privileges and Immunities Clause when, as here, a nonresident makes the same commitments which the Rule demands of qualified state residents. While we believe the Court should affirm the judgment on this ground, affirmance is also required under both the Equal Protection and Commerce Clauses for reasons we now explain.

II. THE RESIDENCE REQUIREMENT FOR MOTION APPLICANTS VIOLATES THE EQUAL PROTECTION CLAUSE.

This Court has made it clear that when "a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction rationally furthers a legitimate state purpose." *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) (footnote omitted). In recent Terms, this Court has invalidated several state laws which advantaged residents over nonresidents, even though it used a "rational basis" standard of review that is more deferential to the state than the one employed in cases under the Privileges and Immunities Clause. Since Rule 1A:1(c) operates in the same discriminatory manner as the laws in these cases, it too is invalid under the Equal Protection Clause.

For example, *Williams v. Vermont*, 472 U.S. 14 (1985), involved a tax which Vermont imposed when cars are registered there. Vermont residents received a credit on this tax if they had purchased the car in another state and paid a sales tax there. However, individuals who were not Vermont residents when they bought their cars were not eligible for that credit if they later moved to Vermont and registered their cars there. The Court rejected the state's arguments that this disparate approach furthered such interests as making users of the state highways pay for their upkeep, or enabling Vermont residents to shop outside the state without economic penalty, finding that the distinctions drawn between residents and nonresidents had no relation to the asserted purposes. *Id.* at 21-27.

In *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985), the Court struck down another tax which sought to "give[ ] the 'home team' an advantage" by taxing out-of-state

insurance companies at a higher rate than in-state companies. The Court emphasized that "a State may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence . . .." *Id.* And in *Hooper v. Bernalillo County Assessor, supra*, the Court struck down a New Mexico law which granted Vietnam veterans a tax exemption if they lived in the state prior to 1976, but not if they moved into the state afterwards, finding there was no valid reason for making that distinction between "old" and "new" residents.

The residence requirement in Rule 1A:1(c) operates in much the same way as the laws in these cases. As in *Williams v. Vermont*, Virginia gives its residents an exemption from an examination requirement that it could impose on all applicants; as in *Metropolitan Life*, Virginia places the burden of taking a bar examination on nonresidents, but not on similarly situated residents. The facts here show that the discrimination effected by Rule 1A:1(c) is no less irrational than the discrimination in those cases. If, after their marriage, Ms. Friedman and her husband had lived at her home in Virginia, she could have been admitted to the Virginia bar on motion. Indeed, even if they lived together in Virginia without getting married, she could still have been admitted on motion. *See Cord v. Gibb*, 219 Va. 1019, 254 S.E.2d 71 (1979). In effect, the only reason why Virginia requires her to take its bar examination is that she moved into her husband's house in Maryland rather than remaining in her home in Virginia.

While *Williams*, *Metropolitan Life* and *Hooper* involved discriminatory taxes, that distinction has no significance. Indeed, this Court's willingness to invalidate those laws bolsters our argument, since the Court has repeatedly stressed that " 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems

of taxation,'" and it "has been reluctant to interfere with legislative policy decisions in this area." *Williams v. Vermont, supra*, 472 U.S. at 22, quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973).

The district court rejected Ms. Friedman's equal protection challenge on the basis of *Brown v. Supreme Court of Virginia*, 359 F. Supp. 549 (E.D. Va.)(three-judge court), *aff'd mem.*, 414 U.S. 1034 (1973)(J.A. 12), where this Court summarily affirmed a judgment upholding Rule 1A:1(c) against a challenge based on a "right to travel" theory, *see Shapiro v. Thompson*, 394 U.S. 618 (1969). Ms. Friedman is making no such argument here, and in any event, the summary affirmance in *Brown* in no way precludes the Court from giving plenary consideration to the arguments she is making in this case. *See Bowers v. Hardwick*, 106 S. Ct. 2841, 2843 n.4 (1986); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 477-78 n.20 (1979). And once such consideration is given, the Court's recent Equal Protection cases require that Rule 1A:1(c) be invalidated under this Clause as well.

III. THE RESIDENCE REQUIREMENT FOR MOTION APPLICANTS VIOLATES THE COMMERCE CLAUSE.

The Commerce Clause of the Constitution (Art. I, § 8, cl. 3) reflects the "principle that our economic unit is the Nation" and that "states are not separable economic units." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-38 (1949). Mindful of this principle, this Court has shown "an alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *City*

of Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978). And whatever the law may once have been, there is no longer any dispute that the practice of law is a matter that is covered by the Commerce Clause. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

This Court has adopted two tests for assessing challenges to state laws under the Commerce Clause, but under either of them, the residence requirement cannot survive. Under the first, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected . . .. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia v. New Jersey, supra*, 437 U.S. at 624. It does not matter whether the purpose of the state law is to exclude out-of-state interests, or whether exclusion is simply the result. "The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980), citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 & n.15 (1981).

Here, the "practical operation" of the residence requirement is to exclude out-of-state attorneys from the Virginia bar in a manner similar to cases which conditioned a company's doing business in the state upon having an office or other facility in that state. Illustrative is the leading case of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), which struck down an Arizona law requiring all Arizona cantaloupes be packed at a plant in that state. Arizona defended its law as promoting the reputation of Arizona growers, a purpose this Court termed "surely legitimate." *Id.* at 143. Nonetheless, the statute was struck down under the "virtually *per se* illegal" test because

it required "business operations to be performed in the home state that could more efficiently be performed elsewhere." *Id.* at 145. *Accord, South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984)(striking down Alaska law that required timber companies to have log processing plant in state in order to bid on timber sold from state lands); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977) (striking down state law limiting importation of Washington apples into North Carolina); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (striking down Mississippi law blocking milk from other states unless they accept Mississippi milk on a reciprocal basis); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (invalidating law forbidding sale of milk not pasteurized and bottled within five miles of town).

Apart from the "virtually *per se* illegal" test, the Court has set out an alternative approach which is more flexible, though still demanding. If a state "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc., supra*, 397 U.S. at 142. "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.* Under this analysis, the "burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interest at stake." *Hunt v. Washington Apple Advertising Comm'n, supra*, 432 U.S. at 353; *see also Hughes v. Oklahoma, supra*, 441 U.S. U.S. at 336.

Under either standard, the residence requirement in Rule 1A:1(c) cannot stand. The Rule favors Virginia residents at the expense of experienced, competent lawyers who want a license to practice their profession in Virginia, but who cannot do so unless they either take a bar examination or move their homes to Virginia. The Rule is thus functionally the same as state laws which favor in-state corporations by requiring out-of-state corporations to build a plant or other facility in the state as a condition of doing business there. For the reasons advanced in the Privileges and Immunities Clause portion of this Argument, there is no reason to believe that this residence requirement achieves any "putative local benefit," and it has an undeniably discriminatory effect on residents of other states.[10]

The district court rejected this argument, considering itself bound by the Fourth Circuit's decision in *Goldfarb v. Supreme Court of Virginia, supra* (J.A. 12), and the court of appeals did not address the point in light of its holding under the Privileges and Immunities Clause. *Goldfarb* involved a challenge to the full time practice rule by a long-time Virginia resident who practiced law in the District of Columbia and who wished to divide his practice between his Washington office and an office near his home in Alexandria. When his application for admission to the Virginia bar under Rule 1A:1 was denied because he did not intend to close his Washington office, he filed suit under the Commerce and Due Process Clauses.

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[10] *Piper* quoted with approval the comment of a former president of the American Bar Association, who said: "Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." Smith, *supra*, 64 A.B.A.J. at 557, quoted at 470 U.S. at 285 n.18. *Accord*, Hafter, *supra*, 53 Miss. L.J. at 9.

In upholding dismissal of his suit, the Fourth Circuit reasoned that Rule 1A:1 enhanced interstate mobility because it made it easier for lawyers to relocate their practice to Virginia. The court noted that since Virginia could make everyone take a bar examination, it could "hardly be penalized" for offering a less onerous alternative. 766 F.2d at 863. The court dismissed out of hand the applicant's claim that the full time practice requirement was an unconstitutional condition, stating that the "constitutionality of state programs that condition eligibility on various grounds is an enormously complex congeries of subjects," but declined to explain why Rule 1A:1(d) was not subject to that doctrine. *Id.* at 864. The court also expressed concern that a ruling in favor of the applicant might prompt Virginia to abolish motion admissions entirely, thus threatening interstate mobility for those lawyers who could satisfy the standards of the Rule. *Id.* at 863.

The reasoning in *Goldfarb* is seriously flawed. There is no basis for dismissing an unconstitutional condition argument on the theory that this doctrine does not apply to Commerce Clause litigation. "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one." *Garrity v. New Jersey, supra*, 385 U.S. at 500; *see also Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. 648, 663 n.14 (1981). Indeed, the reasoning in *Goldfarb* is particularly ironic since this Court's early unconstitutional conditions cases usually involved state laws which imposed discriminatory burdens on out-of-state firms seeking a license to do business in the state, with the restrictions defended under the theory that the license was being dispensed in the exercise of the state's discretion. *E.g., Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 507-08 (1926).

That the approach taken in *Goldfarb* is invalid is illustrated

by *South-Central Timber Development, Inc. v. Wunnicke, supra*, where Alaska decided to sell timber from state lands only to those bidders who at least partially processed the logs in Alaska. This action favored those bidders that had an in-state processing plant, while disfavoring companies which sold unprocessed logs. This Court's plurality opinion held that the in-state plant requirement was *per se* illegal under the Commerce Clause.

The parallels between *South-Central Timber* and *Goldfarb* are striking. Just as Virginia has no duty to admit lawyers on motion, Alaska had no duty to confer a benefit on any private firm by auctioning off its timber. Having decided to confer such a gratuitous benefit, however, the Commerce Clause did not allow Alaska to condition one's eligibility in a way that favored companies with facilities in Alaska over companies which lack such facilities, any more than the Clause allows Virginia to limit the benefit of motion admission to local lawyers or to those who agree to practice in Virginia on a full time basis. To be sure, Alaska was free to respond to the *South-Central Timber* decision by deciding that it would auction its timber off to no one, just as Virginia is free to respond to a decision affirming the judgment below (or a ruling that the full time practice rule is invalid) by eliminating motion admissions entirely.

In deciding *South-Central Timber*, this Court was not deterred by the fact that Alaska might respond in such a fashion to an adverse ruling. Nor did it express concern about the effects that such a move might have on interstate commerce or on those companies that previously qualified for the benefit in question. By contrast, a principal reason why the full time practice rule was upheld in *Goldfarb* was the court's concern that a negative ruling might end motion admissions in Virginia, a result which the court deemed undesirable for those applicants fortunate enough to qualify under the Rule, but which,

under *South-Central Timber*, it should not have considered in reaching its decision. 766 F.2d at 863.

This result-oriented approach, based on judges' predictions about the possible response to their rulings and their views on whether that response would result in sound public policy, finds no support in any of this Court's decisions examining discriminatory laws or conditions (*see* pp. 25-26, *supra*). Thus, *Goldfarb* provides no reason for concluding that the residence requirement in Rule 1A:1(c) is valid under the Commerce Clause. Because that Rule discriminates against out-of-state lawyers in the same manner as the the state laws discussed in this section, it should be struck down under the Commerce Clause as well.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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